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Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 186

1963

ISTHMIAN LINES, INC.,

Petitioner,

against

GEORGE E. STREET,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1963 which affirmed a jury verdict in favor of the plaintiff and against the petitioner herein for damages in the amount of $35,000. The Court of Appeals denied the petition for rehearing and rehearing *en banc* on March 11, 1963.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (R3b), pages A1 to A8 of the Appendix hereto, is reported at 313 F. 2d 35. The petition for rehearing and rehearing *en banc* was denied without opinion.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on January 30, 1963 (R11b, 12b). A timely petition for rehearing and rehearing *en banc* was filed on February 14, 1963, and was denied without opinion on March 11, 1963. This petition for a writ of certiorari is filed less than 90 days after the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

Questions Presented.

1. Is a vessel unseaworthy because an engineering officer of that vessel is injured while using a tool which is "reasonably fit" for the purpose for which he selected it and used it because an injury occurred during such use.

2. Is there sufficient basis to support a jury verdict that a vessel is unseaworthy because of a tool which admittedly was reasonably fit and adequate, when the only probative evidence on the subject was the happening of the accident and testimony that another tool was preferred and proper for the task although there was a complete absence of evidence that the tool used was in any way improper for the task or was defective.

Facts.

The principal facts, upon which this petition is based, were never in dispute. The plaintiff was an experienced engineering officer who had been going to sea for over 20 years. On the morning of his accident the first assistant engineer assigned the plaintiff the task of opening view plates of a large boiler. The vessel was at the end of a bareboat charter to the defendant and the owner's representatives were making a "re-delivery" survey. The view plates were being opened to allow these representatives to examine the inside of the boiler (R11a).

While the plaintiff was doing this job he was approached by two strangers whom he presumed to be longshoremen (R5a). They presented a small turnbuckle which the plaintiff knew was not part of the ship's equipment and asked him to cut the end off (R17a). In the plaintiff's sea career he had never before done work in the vessel's engine room without orders but thinking that cutting the end off the turnbuckle would assist cargo operations he decided to leave his assigned job and cut the end off the turnbuckle.

The plaintiff and the two strangers left the boiler and went to the tool room. The plaintiff was looking for a hacksaw (R6a). But the hacksaws were not hanging in their accustomed place. So he went to the machine shop but found it locked (R7a). The plaintiff next proceeded to the engineer's log desk where the key to the machine shop usually hangs on a peg (R5a). It was not there.

It developed that the first assistant had locked up the tools because the night before some valuable tools were found in a large sack secreted away awaiting an opportune time for removal from the ship (R131a). Consequently, the vessel's tools, including the hacksaws were locked in

the machine shop and the key removed from its usual convenient place (R131a).

When the plaintiff did not find the key in its usual place he stopped the first assistant engineer who was busy with his own work and asked for the key. The first assistant told the plaintiff that he had put the key in his room (R5a). The plaintiff did not attempt to get the key but testified that he knew from experience that the first assistant's room would be locked (R19a). The plaintiff and the two strangers returned to the tool room and found a cold chisel. The plaintiff had a hammer with him because all the tools necessary for the regular contemplated work for the day had been supplied to the plaintiff and the other of the engineering personnel (R12a).

The cold chisel which the plaintiff selected was manufactured for the specific purpose of cutting through metal such as the end of this turnbuckle (R3a). The chisel was supplied to the engineering personnel on the ship for this purpose. The plaintiff had used it for the same type of work before (R26a). There was absolutely no defects in the chisel (R21a). Concededly it was "reasonably fit for the purpose intended" (R21a, R22a).

The plaintiff put the ship's anvil on the deck, placed the small turnbuckle on the flat top of the anvil and held it down with one foot (R20a). He struck the chisel with a hammer and made a cut through the neck of the turnbuckle. Unfortunately the end of the turnbuckle being cut off bounced off the anvil into the plaintiff's eye (R21a, R6a).

STATEMENT.

At the end of the plaintiff's evidence the trial judge dismissed the unseaworthiness claim. However, at the end of the entire case the trial judge reconsidered this action

and permitted both the unseaworthiness and negligence claims to go to the jury. The trial judge relied on no evidence to support the unseaworthiness cause except the fact that the jury could, from their own knowledge and experience, have inferred that the cold chisel was not "reasonably safe". This Court's opinion in *Ferguson* v. *Moore McCormack Lines, Inc.*, 352 U. S. 521, (1957), was the basis for the trial court's action.

The reliance of the trial court and the Court of Appeals on the *Ferguson* case as authority for submitting the case to the jury was misplaced. In the *Ferguson* case there was no issue involving the reasonable fitness of the butcher knife. It was conceded by both parties that the knife was not a reasonably fit tool with which to dig hard ice cream.

The question involved in that case was whether or not the defendant shipowner had been negligent in not furnishing the plaintiff with a tool other than a butcher knife. The defendant in *Ferguson* admitted the impropriety of the butcher knife, but contended that because it was obviously not a fit tool to chop through hard ice cream, it was not reasonably foreseeable that the plaintiff would attempt to use it for such purpose. This Court in affirming the jury verdict in Ferguson's favor held that the jury's experience could be relied on to determine whether a reasonable man might have used a butcher knife to chop the ice cream under circumstances where no other tool was available. In other words this Court in *Ferguson* held that foreseeability is a matter for the jury. There was no question of seaworthiness involved in *Ferguson*.

Judge Hays in the instant case, failed to consider that there was no evidence concerning the cold chisel from which the jury could with reason, conclude that it was not a "reasonably fit" tool. Admittedly, based on the testimony of the first assistant engineer, there may have been a basis

for the jury to infer that a hacksaw was the "best" tool, but the warranty of seaworthiness does not put upon a shipowner the requirement that there be supplied the "best" or an "accident free" tool. According to this Court's teaching in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, (1960), a shipowner need only provide tools which are reasonably fit for their intended use. They need not be perfect nor need they be accident-free.

In holding that because there was testimony that the hacksaw was a proper tool, the jury could conclude that the cold chisel was "unseaworthy", Judge Hays loses sight of the "reasonably fit" concept of the warranty of seaworthiness and substitutes a requirement akin to a guarantee of safety.

Reasons for Granting the Writ.

1. *The Importance of the Question:*

Despite the apparent clarity with which this Court described the warranty of seaworthiness and the elements to be considered in its application in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539 (1960), various panels of the Court of Appeals for the Second Circuit are in apparently irreconcilable conflict—not only among themselves, but with other Courts of Appeals—as to what this Court meant when it spoke of the "divorcement of common law concepts of negligence" from seaworthiness; the shipowner's "absolute duty" and the concept of "reasonable fitness".

It is, therefore, of great importance to the shipping industry that this Court exercise its historic supervisory powers and settle the law in this field by redefining its holding on the maritime doctrine of seaworthiness as propounded in *Mitchell* and clarify the "reasonable fitness" concept of the doctrine.

Failure to do this now can only result in continuing disharmony and conflict and confusion in decisions emanating from a Court of Appeals located at the site of the heart of the shipping industry, and which handles by far the greatest volume of maritime litigation involving the application of the warranty of seaworthiness.

2. *Conflict with the Principles of the Warranty of Seaworthiness set forth in Mitchell* v. *Trawler Racer, Inc., 362 U. S. 539 (1960).*

Judge Hays' decision in the present case is not only in conflict with the majority of cases concerning the warranty of seaworthiness decided by the same Court of Appeals but is contra to this Court's holding on seaworthiness in *Mitchell* v. *Trawler Racer, Inc., (supra)*, and most recently in *Guiterrez* v. *Waterman Steamship Corp.*, United States Supreme Court, decided May 13, 1963, (not yet officially reported). In *Mitchell*, this Court pronounced the divorcement of common law concepts of negligence from the doctrine of seaworthiness and set forth—in what appeared to be clear and explicit language—the test to be applied in determining whether a shipowner had fulfilled the requirements of the warranty of seaworthiness. Mr. Justice Stewart, delivering the majority opinion of this Court in *Mitchell*, said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances *reasonably fit for their intended use. The standard is not perfection, but reasonable fitness;* not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but *a vessel reasonably suitable for her intended service. Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336." (Emphasis supplied, at page 550).

Throughout the language used by Mr. Justice Stewart runs the unmistakable theme of reasonable fitness. It is an integrated part of the warranty. The duty upon the shipowner is absolute only to the extent that he must provide equipment which is reasonably suitable. If the occurrence of injury alone were sufficient to establish unseaworthiness, then the requirement would, in fact, be one of absolute perfection.

In the opinion below, Judge Hays concludes that because there was testimony that a hacksaw was a "proper" tool, a jury could conclude that a vessel was unseaworthy because some other tool was used although there was no testimony that the other tool was improper, inadequate or not reasonably fit for the very task for which the plaintiff selected it.

3. Conflict with the decisions of the Courts of Appeal for the First, Fifth and Ninth Circuits.

The Court of Appeals for the First Circuit in *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186 (1960); cert. den., 364 U. S. 895 (1960), held that in a longshoreman's claim for injuries sustained aboard a vessel, there must be some evidence of a defect in the equipment involved in order to permit the plaintiff's case to go to a jury for a determination of the vessel's seaworthiness.

In *Morales* v. *City of Galveston*, 291 F. 2d 97 (1961), aff'd., 370 U. S. 165 (1962), the Court of Appeals for the Fifth Circuit in affirming a District Court's holding in favor of the respondent shipowner, discussed its understanding of the doctrine of seaworthiness set forth in *Mitchell* to mean that while the shipowner's duty to provide a seaworthy vessel is absolute, it is a duty only to furnish a vessel and appurtenances reasonably fit for the use intended.

More recently, the Court of Appeals for the Ninth Circuit in *Lieberman* v. *Matson Navigation Company*, 300 F. 2d 661, (1962), affirming the trial court's finding in favor of the defendant shipowner, set forth its understanding and application of the warranty of seaworthiness as described in *Mitchell* in the following language:

> "While it is true that the requirement to furnish a seaman a seaworthy vessel is absolute, it is untrue that this duty is limitless. 'The standard is not perfection, but reasonable fitness'. * * * The owner is not an insurer". (At page 662)

The opinion below is obviously in direct conflict with the holdings of this Court and the decisions of the Courts of Appeal for the First, Fifth and Ninth Circuit as well as the opinions of other panels of the Court of Appeals for the Second Circuit on the important question of whether the warranty of seaworthiness requires that a shipowner supply a "reasonably fit" tool or one which is foolproof.

4. *The Various Panels of the Second Circuit Court of Appeals disagree as to the meaning of seaworthiness, Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

This case clearly portrays the intra-circuit dispute in the Second Circuit concerning the application of this Court's holding on the warranty of seaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, (*supra*). The recent decisions from that Court of Appeals are in irreconcilable conflict and indicate the gravity of this dispute.

One faction of that Court bluntly states that, based on policy considerations concerning the "humanitarian" purposes of the doctrine of seaworthiness, the *Mitchell* case is to be read as requiring the imposition of absolute liability upon the shipowner and that considerations of "reasonable fitness" should not be used.

Cases decided by other panels of the same Court of Appeals regard the warranty of seaworthiness as requiring that a vessel, its equipment, appurtenances and tools need only be "reasonably fit for their intended use".

Several recent decisions from the Court of Appeals for the Second Circuit clearly point up the intra-circuit conflict. In *Pinto v. States Marine Lines*, 296 F. 2d 1 (2 Cir.-1961); cert. den. 369 U. S. 843, (1962), the court held that the trial court's charge on unseaworthiness was in accord with the *Mitchell* opinion. Judge Friendly examined this Court's holding in *Mitchell* and concluded that:

> "* * * The Court was at pains to make clear that it was not going to the extreme of requiring any such absolute freedom of all parts of a vessel from all foreign substances at all times * * *. The Court said, ' * * * the owner is not obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.' " (At page 5)

Judge Clark, dissenting on the denial of the petition for a rehearing *en banc* in *Pinto*, in which he was joined by Judge Smith, arrived at an opposite understanding of this Court's meaning in the *Mitchell* opinion. Judge Clark felt that the manifest intent of this Court to safeguard human lives at sea could only mean that the Court intended to require absolute liability of the shipowner.

Judge Hays is apparently in accord with those who interpret Mitchell as requiring absolute liability regardless of "reasonable fitness". Judge Hays, in the opinion below, wrote:

> "* * * In the case at bar there is no defect in the tool selected, nor was the tool 'unfit' in the sense that it could not accomplish the task. *But as in the case at* bar, the jury could conclude from the circumstances

> of the accident that plaintiff 'had been furnished with no safe tool to perform his task.' "

Judge Hays thus pays lip service to *Mitchell*, but disregards the concept of "reasonable fitness" in holding that the happening of an accident itself may be sufficient to permit the jury to infer that a tool was not "safe". (Is this more than being "reasonably fit"?) There was no dispute that the chisel was "reasonably adequate" and was actually manufactured for the use for which the plaintiff selected and used it. Judge Hays acknowledges that the chisel was "reasonably fit" but points to the testimony that another tool was "proper" and the happening of the accident as sufficient "evidence" to support the verdict.

In *Puddu v. Royal Netherlands S.S. Corp.*, 303 F. 2d 752 (2 Cir.—1962); cert den. 371 U. S. 840, (1962), the majority found that the trial court had properly dismissed the longshoreman's claim for personal injuries allegedly resulting from unseaworthiness. Judge Clark also dissented in *Puddu*. Judge Clark felt secure in his belief that his interpretation of the *Mitchell* opinion's concept of unseaworthiness was the correct one, and viewed with apparent annoyance the unwillingness of other members of that Court to accept his interpretation.

Reiterating his position in the *Pinto* dissent, Judge Clark said:

> "So too, the decision seems inconsistent with the rationale of the doctrine of unseaworthiness as laid down by the Supreme Court in *Seas Shipping* v. *Sieracki*, 328 U. S. 85 and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960)." (At page 758)

The "humanitarian" faction supports the theory that the purpose of the doctrine of seaworthiness is to pass the risk and the loss to those best able to bear it. This certainly

is insurer's liability as distinguished from the liability dependent upon "reasonably fit" tools and appliances. Admittedly, to effectuate insurer's liability, the *Mitchell* case must be read as Judge Clark advocates and as interpreted by Judge Hays in the case now before this Court.

In *Nuzzo* v. *Rederi A/S Wallenco*, 304 F. 2d 506 (2 Cir. 1962), the Court reversed the trial court's judgment in favor of the plaintiff longshoreman and remanded the case to the District Court for dismissal. The panel which decided *Nuzzo* understood that the *Mitchell* opinion does not require perfection and adhered to the reasonable fitness requirement. Judge Hincks wrote for the majority in *Nuzzo*:

> "* * * Just as the owner was under 'a duty only to furnish a vessel and appurtenances reasonably fit for their intended use', as was said in *Mitchell*, so the owner's duty, with respect to the stowage of the ship, is only to furnish a stowage reasonably fit for its intended purpose." (At pages 508, 509).

Judge Clark again dissented and said:

> "The fundamental rationale of unseaworthiness as an absolute liability is that the shipowner must bear the loss of injuries caused by unavoidable hazards", * * *. If 'reasonable fitness for their intended use' is to be read as the majority here has done, the shipowner will avoid liability whenever he can prove that he exercised reasonable care." (At page 512).

In spite of Judge Clark's feeling, litigants should be able to rely upon this court's language in *Mitchell* as meaning what it says.

The Second Circuit in *Ezekial* v. *Volusia S. S. Co.*, 297 F. 2d 215 (1961), Cert. den. 369 U. S. 843, (1962), affirmed dismissal of the seaman's case involving an injury to an

eye caused by rust. The Court found that there had been no showing that anything was wrong in the "quality or quantity of the ship's gear". Judge Clark again dissented.

It is respectfully submitted that the language of the *Mitchell* case is irreconcilable with the positions of Judge Hays in this case and the various dissenting opinions of Judge Clark.

Other decisions of the Second Circuit, such as *Richter* v. *Mathiasen's Tanker Industries*, 297 F. 2d 494, (1961); cert. den., 369 U. S. 843, (1962) and *Hooper* v. *Terminal Steamship Co.*, 296 F. 2d 281 (1961); cert. den., 369 U. S. 843, (1962) and *Blier* v. *United States Lines Company*, 286 F. 2d 920, (1961); cert. den., 368 U. S. 836, (1961), apply the same concept of "reasonable fitness for intended use".

Had the Court of Appeals in the present case applied the test for seaworthiness as set forth in the *Mitchell* case and as interpreted by the majority in *Nuzzo*, *Pinto*, *Richter* and *Ezekial*, and the other cases cited, it should have reversed the District Court's refusal to grant the defendant's motion for a directed verdict because of the lack of any probative evidence that the cold chisel was not "reasonably fit" to cut the end off the turnbuckle.

5. A Dismissal of the Unseaworthiness Claim Would Not Have Interfered With Plaintiff's Constitutional Guarantee of a Jury Trial.

The Seventh Amendment to the Constitution was never intended to "preserve trial by jury" unless there were some facts upon which the jury could base its verdict. If there were no probative facts from which a jury could reasonably infer, then the courts have the obligation of deciding the initial question of law, viz: Were there any probative facts upon which the jury could make the required reasonable inference? The Seventh Amendment never

meant to deprive the federal judges of their recognized power to direct a verdict because evidence was insufficient to support the inferences which a jury must make to arrive at a verdict. *Galloway* v. *United States*, 319 U. S. 372, (1943).

No case from this Court or any lower federal court has held that every case, regardless of a lack of probative facts must be determined by a jury.

In *Harris* v. *Pennsylvania Railroad Co.*, 361 U. S. 15, (1959), the plaintiff was injured when he slipped on grease on a railroad crosstie. This Court held that there was sufficient connection between the use of grease in the area of the crosstie and the occurrence of the injury, because plaintiff found grease on his shoes, to enable the jury to infer that the defendant had been negligent in the use of the grease as a lubricant.

Another situation where the facts permitted the jury to infer that the defendant had been negligent arose in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, (1944). There, the evidence showed that when the decedent was last seen he had disappeared behind the train in a direction of the trains intended subsequent movement. The engineer thereafter, without ringing the bell as required, moved the train in the direction where the decedent has last been seen. This was sufficient for a jury to reasonably conclude that the engineer acted negligently in moving the train when he had no reason to believe that the decedent could be anywhere other than in the path of the train's intended movement.

In *Schulz, Administratrix* v. *Pennsylvania Railroad Co.*, 350 U. S. 523 (1956), the district court directed a verdict for the respondent railroad on the grounds that while there was some evidence of negligence and an accidental death,

there was no evidence connecting the two. The Court of Appeals affirmed and this Court reversed.

The Court concluded that a jury could reasonably find the railroad negligent in requiring Schulz to work alone on dark ice covered boats, even though there was no direct evidence showing how he met his death. It was permissible for the jury to infer that Schulz had slipped on the ice in the darkness and fallen overboard.

In all those cases, the inference of negligence, could logically follow from the circumstances which preceded the injury or death. The instant case however presents an entirely different picture. Here there was absolutely no testimony that the chisel was not "reasonably fit for the purpose intended". That one tool is proper, without more, does not reasonably permit the inference that every other tool must be improper (therefore not reasonably fit) to perform the same task.

Where there are no probative facts to support a jury verdict, the trial court should exercise its right to direct a verdict.

In *Moore, Administratrix* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), the decedent was killed when he fell from the platform or step of a railroad car, when the train stopped suddenly. There was no showing that any thing was wrong with the step from which the decedent fell and the engineer testified that he stopped after the decedent had fallen. This Court upheld the setting aside of the jury verdict in favor of the decedent and said:

> "* * * one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof". (At pages 577, 578)

In the instant case for the jury to conclude that the chisel was improper and not reasonably fit for its intended purpose, it (the jury) would have to infer that because there was one tool which was a proper tool to accomplish a given task, no other tool could possibly be reasonably fit, or proper to perform the same function. This would require the jury to reach a verdict without even a basis for speculation.

See also *Brady, Administratrix* v. *Southern Ry. Co.*, 320 U. S. 476 (1943), and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329 (1948), where, after approving the setting aside of the jury verdict by the trial court, this Court said:

> "* * * the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her". (At page 330)

The trial court and the Court of Appeals for the Second Circuit failed to apply the "reasonable inference" test as set forth by this Court in Jones Act[1] and *FELA*[2] cases, when it permitted the jury to base a finding that a chisel was not "reasonably fit" on testimony that a hack-saw was proper where there was no evidence that the cold chisel, which was specifically manufactured to cut steel in the way in which the plaintiff used it, was in any way defective or not reasonably fit to perform the same function.

Conclusion.

It is of the utmost importance to the shipping industry to classify its responsibility under the warranty of seaworthiness.

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[1] 46 USC 688.
[2] 45 USC 51.

Unfortunately the opinion below and several dissenting opinions of the Court of Appeals for the Second Circuit do not follow the "reasonable fitness" test but place the shipowners' seaworthiness obligation much beyond, to the point of insurer liability.

The opinion below is the only opinion in which a ship has been held unseaworthy because of an accident caused by an admittedly "reasonably adequate" tool, solely because there was testimony that another tool was "proper" and an accident occurred during use of the "reasonably adequate" tool. Thus "reasonably safety" is made to mean a greater responsibility upon the shipowner by equating "safety" with being foolproof.

Since there was no probative evidence that the chisel was not reasonably fit, there was no evidence to support the jury verdict that the vessel was unseaworthy and consequently, the Seventh Amendment would not prohibit the district judge from directing a verdict for the defendant on the unseaworthiness claim.

Dated: June 3, 1963

Respectfully Submitted,

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APPENDIX TO PETITION

ORIGINAL OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 62—October Term, 1962

(Argued October 22, 1962 Decided January 30, 1963)

Docket No. 27556

GEORGE E. STREET,

Plaintiff-Appellee,

ISTHMIAN LINES, INC.,

Defendant-Appellant.

Before:

DUMBAUD, Chief Judge,
MOORE and HAYS, Circuit Judges.

Appeal from a judgment for $35,000 entered in favor of the plaintiff by the United States District Court for the Southern District of New York, McGohey, J., after a trial by jury, for injuries resulting from negligence of defendant's agents and/or unseaworthiness. 46 U. S. C. §688.

Affirmed.

Opinion of the Court of Appeals.

JOSEPH M. CUNNINGHAM, of KIRLIN, CAMPBELL & KEATING, New York City (VERNON S. JONES, HENRY J. O'BRIEN, of counsel), for defendant-appellant.

ISRAEL G. SEEGER, of MILLER & SEEGER, New York City (ALBERT V. TESTA, of counsel), for plaintiff-appellee.

HAYS, Circuit Judge:

This is an appeal by defendant, Isthmian Lines, Inc., from a judgment for plaintiff after a trial before a jury. The action was brought by a merchant seaman engineering officer to recover damages for the loss of the sight of his left eye as the result of an injury sustained while aboard the S. S. Andrew Jackson, a vessel owned by the Waterman Steamship Company and bareboat chartered, operated and controlled by defendant.

Suit was predicated on the unseaworthiness of the vessel and on defendant's negligence under the Jones Act (46 U. S. C. 688). Plaintiff, employed by defendant as a junior third assistant engineer aboard the Jackson, had been going to sea since 1942. He had a Marine Engineer's license since 1949. On December 25, 1956, the vessel arrived in New Orleans after a voyage in the Far East and representatives of the owners of the vessel came aboard for the purpose of effecting redelivery. On the morning of December 26th, the work to which plaintiff was assigned was the removal of certain view plates from one of the vessel's boilers in order to permit the owner's representatives to examine the boiler. The only tools that plaintiff needed for this work were wrenches and a hammer. After plaintiff began to work on the boiler, the first assistant engineer locked all the tools in the tool shop with the exception of a few wrenches, a hammer and a cold chisel. On the day before, the first assistant engineer had found a sack of

valuable dies cached in the engine-room, hidden away apparently in preparation for theft. To safeguard the rest of the tools, he locked the tool room. At about 11:15 A. M. plaintiff was approached by two men, who plaintiff knew were not members of the crew but who appeared to him to be longshoremen. They showed him a turnbuckle and asked him to cut an end off. Plaintiff assumed that in cutting off the end of the turnbuckle for these men he would be helping the cargo operations. Accordingly, he agreed to do so and went to the machine shop to get a hacksaw. Finding none there, he went to the log desk, several feet away, looking for the toolroom key, which usually hung on a rack above the engineer's log desk. Not finding the key there, plaintiff started back to the machine shop and met the first assistant engineer on the way. He told the first assistant that he wanted a hacksaw to cut off the end of the turnbuckle "for these two fellows there", and asked him for the key to the tool shop. The first assistant told him that the key was in his room and that he was too busy to get it for him. Plaintiff did not attempt to get the key because, he testified, the first assistant kept his room locked and he did not have access to it nor permission to enter. He thereupon returned to the machine shop and found a cold chisel. He "figured I would do it as quick [with the chisel]. Then I had to dress it up on the emery wheel." He put an anvil on the deck, placed the turnbuckle on the anvil and, holding the turnbuckle down with the left foot, began to cut through the thin neck of the turnbuckle with the hammer and chisel. As he made the last cut, the end bounced off the surface of the anvil and struck him in the eye. At the end of plaintiff's case, the trial judge dismissed the unseaworthiness claim and reserved decision on the negligence question. At the end of the entire case, he advised counsel that he had reconsidered his previous dismissal of the unseaworthiness claim and was going to allow it to go to the jury along with the negligence claim.

Appellant contends that this was error, and that the complaint should have been dismissed in its entirety. We hold that both issues were properly submitted to the jury.

In the course of the trial "the first assistant engineer on the vessel, who had been going to sea since 1941, and had been an engineer since 1949, testified that a hacksaw was the "proper" tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw. Moreover, the plaintiff himself first went to look for a hacksaw, and resorted to the chisel and hammer only when he found that the hacksaw was not available." On the basis of this evidence and its own experience,[1] the jury, "which plays a pre-eminent role in these Jones Act cases,"[2] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put.

Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), a decision heavily relied on by the district court, is directly in point. There plaintiff, a baker, was injured in the course of using a butcher knife to remove from a container some ice cream which was too hard to be removed by the scoop ordinarily used for the purpose. Plaintiff recovered a verdict in the trial court, but this Court reversed and ordered dismissal. 228 F. 2d 891. The Supreme Court reversed our determination and ordered the verdict reinstated. After reviewing the evidence, the Court said:

> "Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (*Jacob* v.

[1] As Judge McGohey correctly stated in the course of the trial, the jury could *infer* "from what happened here, based on their own experience in life, that this kind of operation that this man did, whether he thought it was dangerous or not, was, in fact dangerous and that this tool was, in fact, inadequate to do that job safely."

[2] *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957).

New York City, 315 U. S. 752; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. See *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526. Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act, what we said in *Rogers* v. *Missouri Pacific R. Co.*, *ante*, p. 500, decided this day, is relevant here:

> 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'

Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62." 352 U. S. at 523-24.

As in the case at bar, there was no defect in the tool selected, nor was the tool "unfit" in the sense that it could not accomplish the task. But as in the case at bar, the jury could

conclude from the circumstances of the accident that plaintiff "had been furnished no *safe* tool to perform his task", 352 U. S. at 523 (emphasis supplied).

In *Jacob* v. *New York City*, 315 U. S. 752 (1942), plaintiff was injured when the wrench he was using fell on his toe. In reversing a judgment dismissing the complaint the court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it." 315 U. S. at 752-53 (footnotes omitted).
>
> . . . . . .
>
> "[I]*t was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work.* . . . Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this

case to the jury." 315 U. S. at 756 (emphasis supplied).[3]

See also *Salem* v. *United States Lines Co.*, 370 U. S. 31 (1962); *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9th Cir. 1953); *affirmed*, 347 U. S. 396 (1954).

Appellant makes much of plaintiff's testimony, under cross-examination, that he did not, at the time, think it was dangerous to use a cold chisel as he did. This testimony, like other testimony, was for the jury to weigh and consider with the rest of the evidence. It did not, as appellant appears to contend, require the court to dismiss the complaint.

The burden of selecting proper tools is not upon the seaman. We agree with the statement of the rule in *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629 (5th Cir. 1957), cited with approval in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 328 (1960). Cox was injured while using a block of the wrong type for the operation in which he was engaged. The charge of the trial court was held to be error:

> "Putting on the seaman, as it did, the burden of selecting gear, appliance and tackle to be used, or inspecting that furnished, by the vessel to ascertain whether it was suitable, it was a virtual abandonment of the traditional notions, long expressed, that the vessel is under an absolute duty to supply and keep in order tools and appliances, must furnish a seaworthy ship and seaworthy appliances. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S.S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, 1944, A. M. C. 1; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 A. M. C. 698. The obligation to furnish the gear was on the vessel. The bosun undertook to

[3] Although in both *Ferguson* and *Jacob* the complaint sounded only in negligence, it is clear that the rationale of the Court's opinions applies equally to claims of unseaworthiness.

> furnish it. If through the bosun the shipowner did not comply with the heavy obligation to provide seaworthy equipment, it was not the duty of the seaman to select it or pick from the good and bad." 247 F. at 635-36.

Appellant's remaining points are without merit.

Affirmed.

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Supreme Court of the United States

October Term, 1963

No. 180

ISTHMIAN LINES, INC.,

Petitioner,

against

GEORGE E. STREET,

Respondent.

BRIEF ON BEHALF OF RESPONDENT GEORGE E. STREET IN OPPOSITION TO THE PETITION OF ISTHMIAN LINES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

There are no questions properly presented on behalf of the petitioner Isthmian Lines, Inc., for review by this court. The jury's verdict in favor of the plaintiff was based, not upon the mere happening of the accident, but upon probative evidence from which the jury could infer that the tool with which plaintiff was furnished was not reasonably fit to cut off the end of the turnbuckle with reasonable safety.

The alleged questions which the petitioner advances as questions to be resolved by this court are inaccurately framed and do not reflect the testimony adduced at the trial.

FACTS

Plaintiff was employed by the defendant as a junior third assistant engineer aboard the SS ANDREW JACKSON, a vessel owned by Waterman Steamship Corporation, but which was bareboat chartered to the defendant, Isthmian Lines, Inc. On December 25th, 1956 the vessel had returned from a voyage in the Far East, at which time representatives of the owners had come aboard for the purpose of effecting redelivery of the vessel to Waterman Steamship Corporation.

On the morning of December 26th, plaintiff was assigned by the first assistant engineer to open up the port boiler. After plaintiff began to work on the boiler, the first assistant engineer locked up all the tools in the tool shop, including all the hacksaws, with the exception of a few wrenches and a hammer and chisel (R7a).* There was testimony to the effect that this was done to keep the tools from being stolen. While plaintiff was working on this boiler, two men, who were dressed like longshoremen, approached him, showed him a turnbuckle and asked him if he would cut off the end of this turnbuckle for them. Plaintiff assumed that, in cutting off the end of the turnbuckle for these men, he would be helping the cargo operations (R15a, R16a).

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*a numbers refer to pages in appendix of defendant-appellant-petitioner.

The plaintiff intended to use a hacksaw for this purpose (R5a, R17a, R18a) and went to the tool shop looking for one. He found, however, that the tool shop was locked. He then went to the engine room log desk and looked for the key to the tool shop, which was usually kept there for the use of the engineering officers. When he did not find the key there, plaintiff went back to the machine shop where he met the first assistant engineer (R5a).

At that time the plaintiff informed the first assistant engineer that he wanted to get a hacksaw to cut off the end of the turnbuckle, which he had in his hand, for the two fellows who were standing nearby, and he asked the first assistant engineer for the key to the tool shop (R18a). The first assistant engineer told the plaintiff that the key to the tool shop was in his room, and that he was in a hurry (R5a, R6a, R19a) and left, so plaintiff decided to cut the end off the turnbuckle with a cold chisel. The plaintiff did not attempt to get the key to the tool shop from the first assistant engineer's room, because he testified that the first assistant engineer kept his room locked and that he did not have access thereto (R8a) or permission to go in there (R19a). Plaintiff thereupon placed the turnbuckle on an anvil on the deck and began to cut through the neck of the turnbuckle with the hammer and chisel. As the plaintiff cut off the end of the turnbuckle, it flew up and struck him in the left eye.

There was testimony by the plaintiff to the effect that when a hammer and chisel were used for the purpose of cutting steel, that a piece of steel might fly up from it or off to the side (R25a). Plaintiff also testified that although

there were goggles aboard the ship they were only intended to be used with the emery wheel, and since the goggles were made of glass they would not have protected him from the end of the turnbuckle, which flew up and struck him, as the glass would have shattered. The goggles were intended to prevent sand or emery dust from entering the eyes of someone using the emery wheel (R25a). Plaintiff also testified that it was his practice to use a hacksaw to cut steel, and that he didn't go around chopping things (R26a).

The first assistant engineer Syre D. Griffiths testified that he remembered Street asking him for a key to the tool shop but that he had no recollection of the plaintiff asking him for the key to the tool shop for the specific purpose of getting a tool to cut the end off a turnbuckle (R131a). He claimed that he knew nothing about plaintiff's accident, or the cause of the injury to plaintiff's eye (R133a), and that he was only looking for a piece of material that could have caused the accident (R2b), when he went to the engine room after plaintiff had been injured and unerringly picked up the end of the turnbuckle (Defendant's Exhibit B in evidence) from amongst numerous other objects on the deck in the machine shop (R2b)."

Although the chisel was physically able to cut off the end of the turnbuckle, the first assistant engineer testified that in his opinion the proper tool for that purpose was a hacksaw (R135a), which was the tool that plaintiff had first tried to obtain. The first assistant engineer also testified that, in his opinion, the hacksaw was the safest tool for that purpose (R138a).

R numbers refer to pages in appendix of plaintiff-appellee, respondent.

STATEMENT

The trial court and the court of appeals committed no error in relying on this court's opinion in *Ferguson v. Moore McCormack Lines, Inc.*, 352 U. S. 521 (1957) since this decision is directly in point. The facts in the *Ferguson* case and the facts in the case at bar are quite similar. In *Ferguson*, the plaintiff, being unable to remove the ice cream with the conventional scoop, used a butcher knife, which the Supreme Court said the defendant should have foreseen he would do. In the case at bar, plaintiff, being unable to obtain the hacksaw, used a hammer and chisel, which the defendant in this case should have foreseen he would do. In both cases the tool used by the plaintiff was physically capable of accomplishing the desired result, but neither tool was reasonably fit to accomplish the desired result with reasonable safety to the person using it. In both cases the defendant failed to furnish the plaintiff with a proper tool and one reasonably fit to be used with reasonable safety. The fact that the vessel supplies a tool which is not defective does not mean that the vessel has complied with its warranty of seaworthiness. The claim was made in both cases that the tool supplied was not the proper tool and the court in *Ferguson* held that the fact that there was no tool close at hand which would have *safely* performed the task was sufficient evidence to take the case to the jury.

In the case at bar, there is sufficient evidence that the hammer and chisel were not the proper tools to *safely* perform the job of cutting off the end of the turnbuckle. The plaintiff testified, and indeed the jury could draw of the

own common sense and experience, with respect to the possibility that a piece of metal being cut by a chisel was likely to fly up or to the side (R25a). The plaintiff testified that when a hammer and chisel were used for the purpose of cutting steel, a piece of steel might fly up from it or off to the side, that it was his practice to use a hacksaw to cut steel, that he himself first went to look for a hacksaw and resorted to the chisel and hammer only when he found that the hacksaw was not available. The first assistant engineer testified that a hacksaw was the proper tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw himself. It was on the basis of this testimony that the trial judge submitted the unseaworthy cause to the jury, not without evidence, as stated in the petition.

Judge Hays in the case at bar, based his opinion upon the same testimony and evidence and came to the conclusion that

> "on the basis of this evidence and its own experience the jury [ ] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put."

Far from losing sight of the "reasonably fit" concept of the warranty of seaworthiness as laid down by this court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), Judge Hays, in fact, very plainly relied thereon.

REASONS FOR DENYING THE WRIT

1. There are no questions of importance presented for review by this court.

Notwithstanding the broad general statements of the petition with respect to the importance of the "questions" presented and the alleged intra and inter circuit conflicts, there is, in fact, no real issue presented, requiring the intervention of this court. The decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), and the statement of the doctrine of seaworthiness therein, require no clarification. There is no real conflict with respect thereto, either within the Second Circuit or between that circuit and any of the others. In point of fact all of the cases cited by the petitioner are in accord and all follow the *Mitchell* doctrine.

The question presented by the petitioner is based entirely upon the false premise, created by it out of whole cloth, that the holding of Judge Hays' opinion is that "the happening of an accident itself may be sufficient to permit the jury to infer that a tool was not 'safe'".

The true holding of the court appears in the opinion at page A-4 of the Appendix to the Petition as follows:

> "In the course of the trial the first assistant engineer on the vessel, who had been going to sea since 1941, and had been an engineer since 1949, testified that a hacksaw was the 'proper' tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw. Moreover, the plaintiff himself first went to look for a hacksaw, and resorted to the chisel and hammer only when he found that the hacksaw was not avail-

able." On the basis of this evidence and its own experience,[1] the jury, "which plays a pre-eminent role in these Jones Act cases,"[2] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put."

2. The decision of the Court of Appeals in the case at bar is consistent with and does not conflict with the holding of the United States Supreme Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

Judge Hays' decision in the case at bar is not only in accord with the majority of cases concerning the warranty of seaworthiness decided by the Court of Appeals for the Second Circuit, but is in accord with this court's holding on seaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), wherein it was held that the shipowner was under an absolute duty to furnish a vessel and appurtenances reasonably fit for their intended use.

The "reasonable fitness" doctrine of *Mitchell* must be read with the "*reasonable safety*" doctrine previously expounded by this court in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), and these two when read together establish the extent of the shipowner's absolute duty, which is to furnish a vessel, equipment and appliances which are reasonably fit to accomplish the purpose for which they are intended *with reasonable safety*.

---

[1] As Judge McGohey correctly stated in the course of the trial, the jury could infer "from what happened here, based on their own experience in life, that this kind of operation that the man did, whether he thought it was dangerous or not, was, in fact, dangerous and that this tool was, in fact, inadequate to do that job safely."

[2] *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957).

The doctrine of reasonable safety appears as far back as 1942 in *Jacob* v. *City of New York*, 315 U. S. 752, in which this court said at page 756:

> "... it was for the jury to decide whether a monkey wrench was a *reasonably safe* and suitable tool for petitioner's work. ..." (Italics added)

Again, in 1944, in *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96, this court said at page 104:

> "These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, *likewise require that safe appliances be furnished when and where the work is to be done*." (Italics added)

In *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), this court clearly stated the shipowner's duty to furnish tools which could be used with reasonable safety in the following statement:

> "We conclude that there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task. ... There was evidence that the scoop with which he had been furnished was totally inadequate to remove ice cream of the consistency of that which he had to serve. ... There was no showing that any device was close at hand which would have *safely* performed the task.
>
> Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (Jacob v.

> New York City, 315 US 752, 86 L. ed. 1166, 62 S. Ct. 854; Schulz v. Pennsylvania R. Co., 350 US 523, 100 L. ed. 668, 76 S. Ct. 608), could conclude that petitioner had been furnished no *safe* tool to perform his task. * * *
>
> Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts * * * should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' Wilkerson v. McCarthy, 336 US 53, 62, 93 L. ed. 497, 505, 69 S. Ct. 413." (Italics added)

Although, as pointed out by the Court of Appeals in the opinion below, in both the *Ferguson* and *Jacob* cases the complaint sounded only in negligence, it is clear that the rationale of the court's opinions in both cases applies equally to claims of unseaworthiness.

Again, in 1960, in *Michalic* v. *Cleveland Tankers*, 364 U. S. 325, this court held that testimony that a wrench was beaten, battered, old or chewed up was sufficient to allow an inference by the jury that it could not be used *safely* for the function for which it was designed, and as recently as 1961, in *Pinto* v. *States Marine Corporation*, 296 F. 2d, page 1, the District Court judge in a charge approved by the Court of Appeals for the Second Circuit stated that

> "The essential test is whether, considering place and circumstance, the area was reasonably fit to permit Pinto to perform his tasks with *reasonable safety*." (Italics added)

Thus, it can clearly be seen that the duty of the ship-owner is to furnish tools and appliances not merely reasonably fit, but reasonably fit to be used with reasonable safety. And Judge Hays' statement in the present case "on the basis of this evidence and its own experience the jury, which plays a pre-eminent role in these Jones Act cases, could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put" directly conforms with the decision of this court in *Mitchell* v. *Trawler Racer* (*supra*).

3. There is no conflict between the decisions of the Court of Appeals for the Second Circuit and the decisions of the Court of Appeals for the First, Fifth and Ninth Circuits.

The decisions cited by petitioner in the First, Fifth and Ninth Circuits, as allegedly conflicting with the decisions of the Court of Appeals for the Second Circuit are actually in accord therewith. The alleged conflict is nothing more than an abortive attempt to create such an inter-circuit conflict in an effort to bring its petition within the purview of Rule 19 of this Court's rules.

There is no conflict between *Arena* v. *Luckenbach Steamship Company*, 279 F. 2d 186 cert. den. 364 U. S. 895 (1960), decided by the United States Court of Appeals for the First Circuit and the decision of the Court below, in the instant case. In *Arena* the court stated at pages 187 and 188:

> "The defendant having had nothing to do with the loading of the vessel, liability depends upon proof of defective *or improper equipment*."

> * * * A vessel is not unseaworthy simply because the improper type of equipment was used by someone *unless, also, it appears that the proper type was unavailable. In the ice-cream case, of which plaintiff makes much, the waiter's use of a knife was forced upon him by the absence of the proper tool. Ferguson v. Moore-McCormack Lines*, 1956, 352 U. S. 521, 522, 77 S. Ct. 457, 1 L. Ed. 2d 511." (Italics added)

Morales v. City of Galveston, 231 F. 2d 97 and *Lieberman v. Matson Navigation Company*, 308 F. 2d 668 are also in accord with *Mitchell v. Trawler Racer* (*supra*) and the case at bar insofar as their understanding and application of the warranty of seaworthiness as described in the *Mitchell* case is concerned. None of these cases hold that the warranty of seaworthiness requires that a shipowner furnish a tool which is foolproof, whereas all of them are in agreement that the warranty of seaworthiness requires that a shipowner furnish tools and appliances reasonably fit for their intended use with reasonable safety. There is, clearly, no conflict between the decisions of the Courts of Appeal for the First, Second, Fifth and Ninth Circuits which would justify the granting of certiorari.

1. There is no intra-circuit conflict within the Second Circuit as to the alleged questions presented by this petition which would warrant granting certiorari. The dissent of one judge in four different cases and the dissent of two judges in a panel of nine sitting en banc does not constitute intra-circuit conflict of decision.

Contrary to the statement contained in the petition, there are no factions within the various panels of the Second Circuit and there is no intra-circuit dispute in the Second Circuit concerning the application of this court's holding

on the warranty of seaworthiness in *Mitchell v. Trawler Racer* (*supra*). Judge Clark has indeed dissented from the majority opinions in the *Pinto*, *Paddu*, *Ezekiel* and *Nuzzo* cases, but the existence of a lone dissenting voice, no matter how often raised, cannot and does not create an intra-circuit conflict. To hold otherwise would require this court to review any Court of Appeals decision which was not unanimous, which is obviously not the intent of Rule 19 or of this court. Actually, in some of the very cases cited by petitioner as allegedly constituting intra-circuit conflict, to wit, the *Pinto*, *Hooper*, *Ezekiel* and *Richter* cases, the petitioners made the same claim of intra-circuit conflict, but in each of these cases this court denied certiorari. The fact of the matter is that all the decisions of the various panels of the Court of Appeals for the Second Circuit are in conformity with the reasonable fitness concept of the warranty of seaworthiness as enunciated by this court in *Mitchell v. Trawler Racer* (*supra*), and even Judge Clark in his dissenting opinions does not advocate the imposition on the shipowner of insurer liability for unseaworthiness, but conforms to this concept of reasonable fitness.

In *Ezekiel v. Volusia Steamship Co.*, 297 F. 2d 215 (1961) cert. den. 369 U. S. 843 (1962), in one of the very dissenting opinions cited by petitioner as allegedly constituting intra-circuit conflict, Judge Clark made the following statement at page 218:

> "Liability for failure to furnish a seaworthy vessel is absolute, but a vessel need not be accident-free to be 'seaworthy.' Liability for injuries caused by the vessel and its appurtenances accrues only when the owner has failed to furnish a vessel and appurtenances 'reasonably fit for their intended use.'

> Mitchell v. Trawler Racer, Inc., supra, 362 U. S. 539, 550, 80 S. Ct. 926, 932, 4 L. Ed. 2d 941. On the other hand, this does not mean, as my brothers seem to believe, that he must make only reasonable efforts to furnish seaworthy appliances. He has an absolute duty to furnish a reasonably fit ship."

Since this is the very same language used by Mr. Justice Stewart in the *Mitchell* case, petitioner's contention that the language of the *Mitchell* case is irreconcilable with the position of Judge Hays in this case and the dissenting opinions of Judge Clark is beyond comprehension and is obviously without merit. A more exact conformity with the holding of this court in the *Mitchell* case would be hard to conceive.

In *Pinto* v. *States Marine Corporation*, 296 F. 2d 1 (1961), cert. den. 369 U. S. 843 (1962), Judge Clark in his dissenting opinion made the following statement on page 8, which clearly shows his position to be one of conformity rather than conflict with this court's holding in the *Mitchell* case:

> "* * *, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and, to enforce the shipowner's responsibility by strict liability is not one to combat."

A reading of Judge Clark's dissenting opinions in the *Puddu* and *Nuzzo* cases also reveals that he does not advocate insurers liability for the shipowner for unseaworthiness, but adheres to the reasonable fitness concept.

Significantly, and contrary to petitioner's contention, in *Pudda v. Royal Netherlands Steamship Company*, 303 F. 2d 752 (1962) cert. den. 371 U. S. 840 (1962), Judge Hays wrote a concurring opinion in which he quite clearly shows that he does not interpret this court's holding in the *Mitchell* case as requiring absolute liability on the ship-owner regardless of reasonable fitness. On page 757, in the *Pudda* case, Judge Hays made the following statement:

> "The difficulty with the concept of unseaworthiness arises from the fact that while the authorities hold that there is liability without fault, there is no case which holds that there is absolute liability."

In *Nuzzo* v. *Rederi*, 304 F. 2d 506 (1962), Judge Clark dissented because he felt that the majority were introducing negligence concepts into the law of unseaworthiness and not because he felt that perfection was required, rather than reasonable fitness for intended use. The reason for his dissent is succinctly set forth on page 512 in the following statement:

> "But the opinion of the majority overruling the findings below appears to reintroduce negligence concepts into the law of unseaworthiness, and thus to overthrow, by a kind of covert counterrebellion, the rule of absolute liability laid down in Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, and Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, and recently reaffirmed in Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941."

Unfortunately, the petition herein at pages 10 and 11 misquotes a portion of Judge Hays' opinion below as a comparison of the petition and the opinion itself as set forth

in the appendix will readily show. What Judge Hays actually said in the portion misquoted by petitioner was as follows:

> "As in the case at bar, there was no defect in the tool selected, nor was the tool 'unfit' in the sense that it could not accomplish the task. But as in the case at bar, the jury could conclude from the circumstances of the accident that plaintiff 'had been furnished no *safe* tool to perform his task.' 352 U. S. at 523."

Petitioner further confuses the situation by stating that Judge Hays is paying lip service to the *Mitchell* case in this quotation, whereas, in fact, Judge Hays' reference was to the opinion of this court in the *Ferguson* case. To further complicate and compound the confusion, petitioner further misquotes Judge Hays as allegedly acknowledging that the chisel used by the plaintiff in the case at bar was reasonably fit, whereas the most solace and comfort that petitioner could possibly derive from the above quotation is Judge Hays' opinion that the chisel was not unfit in the sense that it could not accomplish the task of cutting the end off the turnbuckle. Concededly, the chisel was capable of physically chopping the end off the turnbuckle, but this is a far cry from quoting Judge Hays as acknowledging that the chisel was reasonably fit. To say that a tool is not unfit to accomplish a stated purpose is not the same as saying that this tool is reasonably fit to accomplish this purpose with reasonable safety. This distortion of Judge Hays' opinion merely serves to further highlight the desperate attempts of the petitioner to create a question for review when no such question, in fact, exists.

Not only did the Court of Appeals in the present case apply the test for seaworthiness as set forth in the *Mitchell* case, and as interpreted by the majority in the *Nuzzo*, *Puto*, *Richter* and *Ezekiel* cases, but it properly did not and should not have reversed the District Court's refusal to grant the defendant's motion for a directed verdict, because there was sufficient probative evidence that the cold chisel was not reasonably fit to cut the end off the turnbuckle with reasonable safety.

3. There was sufficient probative evidence of negligence and unseaworthiness which entitled plaintiff to a jury trial on these issues.

The whole thrust of petitioner's argument herein, as it was at the trial and on the appeal below, is directed towards its contention that there were no probative facts from which the jury could draw the reasonable inferences necessary to its verdict. However, since there was in fact proof that the tool which plaintiff in the case at bar was using was improper, inadequate and not reasonably fit to cut off the end of the turnbuckle with reasonable safety, and that the proper tool was unavailable to him, there was sufficient probative evidence from which the jury could have drawn reasonable inferences of negligence and unseaworthiness. The trial judge did not submit the case to the jury upon the theory that liability for breach of warranty could be inferred from the mere happening of an accident, but as previously stated, upon the basis of testimony by the plaintiff to the effect that when a hammer and chisel were used for the purpose of cutting steel, a piece of steel might fly up from it or off to the side, that it was his practice to use a hacksaw to cut steel, that he himself first went to look

for a hacksaw and resorted to the chisel and hammer only when he found that the hacksaw was not available, and upon the basis of testimony by the first assistant engineer that a hacksaw was the proper tool to use for the purpose for which the plaintiff used the cold chisel, and that he, himself, would have used a hacksaw. Thus, there was probative evidence from which the jury could have inferred that the chisel was not reasonably fit to chop off the end of a turnbuckle with reasonable safety, and there was evidence of negligence and unseaworthiness which entitled plaintiff to a jury trial on these issues.

The trial court and the Court of Appeals for the Second Circuit unquestionably applied the "reasonable inference" test as set forth by this court. The rule concerning submission of cases to a jury in *Jones Act* and *FELA* cases is expressed by this court in *Rogers* v. *Missouri Pacific Railroad*, 352 U. S. 500 (1957) as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

In *Rogers* the Supreme Court went on to say:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out

whether or not the evidence allows the jury a choice of other probabilities."

See also

Webb v. *Illinois Central Rail Road Co.*, 352 U. S. 512.

In *Tennant* v. *Peoria and P. U. Railway Company*, 321 U. S. 29, the Supreme Court stated the rule that probative facts must be presented from which negligence and causal relation could reasonably be inferred. The court then went on to state at page 35:

> "If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors."

In the same case at page 35, the Supreme Court said

> "* * * It is the jury not the court which is the fact finding body. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Since the record herein reveals probative facts and evidence upon which the jury could and did draw inferences and make findings that the defendant was negligent and the vessel unseaworthy, the case was properly submitted to the jury on both of these theories. As pointed out in the opinion below, this court in 1942, in the *Jacob* case,

supra, held that it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work and the fact that the case was close was no reason for the court to usurp the function of the jury. So, in the case at bar, it was for the jury to decide whether a hammer and chisel were reasonably safe and suitable tools for the plaintiff's work and the case was properly submitted to them for such determination.

CONCLUSION

The opinion below, the various dissenting opinions in the Second Circuit and the decisions of the Courts of Appeal in the First, Fifth and Ninth Circuits, all follow the reasonable fitness concept of the doctrine of seaworthiness as enunciated by this court in the *Mitchell* case. There is no conflict among them and not one of them has placed the shipowner's obligation to provide a seaworthy vessel at the point of insurer liability. Since there was probative evidence that the chisel was not reasonably fit to cut off the end of a turnbuckle with reasonable safety, there was sufficient evidence to entitle plaintiff to a jury trial and to support the jury's verdict in his favor.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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